

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACOB B. GRZECZKOWSKI,

NO. C12-1862-JCC-JPD

Plaintiff,

v.

REPORT AND
RECOMMENDATION

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,¹

Defendant.

Plaintiff Jacob B. Grzeczowski appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his applications for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be AFFIRMED.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, plaintiff was a thirty-five year old man with the equivalent of a high school education and some vocational training. Administrative Record (“AR”) at 43, 137, 144-45. His past work experience includes employment as a janitor, cook,

¹ Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the defendant in this suit. **The Clerk of Court is directed to update the docket accordingly, and the parties are ordered to update the caption on all future filings with the Court.**

1 and kitchen supervisor, although his longest job at Dominos Pizza lasted only five or six
2 months in 1994. AR at 41-43, 48, 144, 163.

3 On February 23, 2010, plaintiff filed a claim for SSI payments, alleging an onset date
4 of January 1, 2001. AR at 119-25. Plaintiff asserts that he is disabled due to bipolar disorder,
5 mood disorder, anxiety, hepatitis C, migraines, and memory problems. AR at 137, 143-44.

6 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 62-
7 65, 67-72. Plaintiff requested a hearing, which took place on April 18, 2011. AR at 38-59.

8 On May 12, 2011, the ALJ issued a decision finding plaintiff not disabled and denied benefits
9 based on his finding that plaintiff could perform a specific job existing in significant numbers
10 in the national economy. AR at 19-37. Specifically, the ALJ found that plaintiff could work as
11 a janitor, office helper, or night cleaner. AR at 31. Plaintiff's administrative appeal of the
12 ALJ's decision was denied by the Appeals Council, AR at 1-6, making the ALJ's ruling the
13 "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On
14 November 5, 2012, plaintiff timely filed the present action challenging the Commissioner's
15 decision. Dkt. 5.

16 II. JURISDICTION

17 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
18 405(g) and 1383(c)(3).

19 III. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
21 social security benefits when the ALJ's findings are based on legal error or not supported by
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
23 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
24 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
 2 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
 3 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
 4 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
 5 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
 6 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
 7 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
 8 must be upheld. *Id.*

9 The Court may direct an award of benefits where "the record has been fully developed
 10 and further administrative proceedings would serve no useful purpose." *McCartey v.*
 11 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 12 (9th Cir. 1996)). The Court may find that this occurs when:

13 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 14 claimant's evidence; (2) there are no outstanding issues that must be resolved
 15 before a determination of disability can be made; and (3) it is clear from the
 record that the ALJ would be required to find the claimant disabled if he
 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 17 erroneously rejected evidence may be credited when all three elements are met).

18 IV. EVALUATING DISABILITY

19 As the claimant, Mr. Grzeczowski bears the burden of proving that he is disabled
 20 within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111,
 21 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to
 22 engage in any substantial gainful activity" due to a physical or mental impairment which has
 23 lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
 24 §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments

are of such severity that he is unable to do his previous work, and cannot, considering his age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b).² If he is, disability benefits are denied. If he is not, the Commissioner proceeds to step two. At step two, the claimant must establish that he has one or more medically severe impairments, or combination of impairments, that limit his physical or mental ability to do basic work activities. If the claimant does not have such impairments, he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to step three to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or equals one of the listings for the required twelve-month duration requirement is disabled. *Id.*

When the claimant’s impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s

² Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
 2 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
 3 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
 4 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,
 5 then the burden shifts to the Commissioner at step five to show that the claimant can perform
 6 other work that exists in significant numbers in the national economy, taking into consideration
 7 the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),
 8 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable
 9 to perform other work, then the claimant is found disabled and benefits may be awarded.

10 V. DECISION BELOW

11 On May 12, 2011, the ALJ issued a decision finding the following:

- 12 1. The claimant has not engaged in substantial gainful activity since
 13 February 23, 2010, the application date.
- 14 2. The claimant has the following severe impairments: bipolar disorder
 without psychosis and cannabis dependence in early remission.
- 15 3. The claimant does not have an impairment or combination of
 16 impairments that meets or medically equals one of the listed
 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 17 4. After careful consideration of the entire record, the undersigned finds
 18 that the claimant has the residual functional capacity to perform a full
 19 range of work at all exertional levels but with the following
 20 nonexertional limitations: he has the mental capability to adequately
 21 perform the mental activities generally required by competitive,
 22 remunerative work as follows: understand, remember and carry out
 23 simple 1 to 2 step instructions, required of jobs classified at a level of
 24 SPV 1 and 2 or unskilled work; he would have average or moderate
 ability to perform sustained work activities (i.e. can maintain attention
 and concentration, persistence and pace) in an ordinary work setting
 on a regular and continuing basis (i.e., 8 hours a day, for 5 days a
 week, or an equivalent work schedule) within customary tolerances of
 employer rules regarding sick leave and absence; he can make
 judgments on simple work-related decisions and he can respond
 appropriately to supervision, coworkers and deal with changes all

1 within a stable work environment not dealing with the general public
 2 as in a sales/cashier position or where the general public is frequently
 3 encountered as an essential element of the work process such as
 telemarketing, incidental contact with the general public is not
 precluded so long as the public is not a part of the work process.

4 5. The claimant has no past relevant work

5 6. The claimant was born on XXXXX, 1975 and was 34 years old, which
 6 is defined as a younger individual age 18-49, on the date the
 application was filed.³

7 7. The claimant has at least a high school education and is able to
 communicate in English.

8 8. Transferability of job skills is not an issue because the claimant does
 9 not have past relevant work.

10 9. Considering the claimant's age, education, work experience, and
 11 residual functional capacity, there are jobs that exist in significant
 numbers in the national economy that the claimant can perform.

12 10. The claimant has not been under a disability, as defined in the Social
 Security Act, since February 23, 2010, the date the application was
 13 filed.

14 AR at 24-31.

15 VI. ISSUE ON APPEAL

16 1. Did the ALJ err by rejecting medical opinions by an examining psychiatrist,
 examining psychologist, and psychiatric nurse practitioner?

17 Dkt. 20 at 1; Dkt. 21 at 2.

18 VII. DISCUSSION

19 A. The ALJ Did Not Err in Evaluating the Medical Opinion Evidence

20 1. *Standards for Reviewing Medical Evidence*

21 As a matter of law, more weight is given to a treating physician's opinion than to that
 22 of a non-treating physician because a treating physician "is employed to cure and has a greater
 23 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d

24 ³ The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
2 physician's opinion, however, is not necessarily conclusive as to either a physical condition or
3 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
4 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
5 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
6 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
7 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough
8 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
9 making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
10 merely state his/her conclusions. "He must set forth his own interpretations and explain why
11 they, rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22
12 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.
13 *Reddick*, 157 F.3d at 725.

14 The opinions of examining physicians are to be given more weight than non-examining
15 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
16 uncontradicted opinions of examining physicians may not be rejected without clear and
17 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
18 physician only by providing specific and legitimate reasons that are supported by the record.
19 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

20 Opinions from non-examining medical sources are to be given less weight than treating
21 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
22 opinions from such sources and may not simply ignore them. In other words, an ALJ must
23 evaluate the opinion of a non-examining source and explain the weight given to it. Social
24 Security Ruling ("SSR") 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives

1 more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a
2 non-examining doctor's opinion may nonetheless constitute substantial evidence if it is
3 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
4 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

5 2. *Dr. Hopfenbeck*

6 Psychiatrist James Hopfenbeck, M.D., examined and evaluated plaintiff on November
7 16, 2009 for the Department of Social and Health Services ("DSHS"). He observed that
8 plaintiff had marked symptoms of mania and pressured speech, and commented that plaintiff
9 had very rapid speech, tended to over explain, and get off track. AR at 325-30. On mental
10 status exam, plaintiff could not perform serial 7 subtractions and made a few mistakes
11 subtracting 3's from 20. AR at 330. Dr. Hopfenbeck diagnosed plaintiff with bipolar affective
12 disorder and cannabis dependence, and assessed a Global Assessment of Functioning Score
13 ("GAF") of 40.⁴ He noted that plaintiff had just re-started a "trial of appropriate medication"
14 in September 2009, but had tried numerous medications in the past. AR at 328-29. He opined
15 that plaintiff was "markedly" limited in his ability to understand more than two step
16 instructions, exercise judgment and make decisions, interact appropriately in public contacts,
17 tolerate the pressures and expectations of a normal work setting, and maintain appropriate

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19 ⁴ The GAF score is a subjective determination based on a scale of 1 to 100 of "the
20 clinician's judgment of the individual's overall level of functioning." AMERICAN PSYCHIATRIC
21 ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).
22 A GAF score falls within a particular 10-point range if either the symptom severity or the level
23 of functioning falls within the range. *Id.* at 32. For example, a GAF score of 51-60 indicates
24 "moderate symptoms," such as a flat affect or occasional panic attacks, or "moderate difficulty
in social or occupational functioning." *Id.* at 34. A GAF score of 41-50 indicates "[s]erious
symptoms," such as suicidal ideation or severe obsessional rituals, or "any serious impairment
in social, occupational, or school functioning," such as the lack of friends and/or the inability
to keep a job. *Id.* A GAF score of 31-40 indicates "some impairment in reality testing and
communication" or "major impairment in several areas, such as work or school, family
relations, judgment, thinking or mood."

1 behavior in a work setting. AR at 328. With respect to plaintiff's substance abuse, Dr.
2 Hopfenbeck noted that plaintiff was dependent on cannabis, but opined that "cannabis appears
3 separable from [his] mood disorder" and that "he needs priority to be stabilization on
4 medications." AR at 327. Finally, Dr. Hopfenbeck opined that plaintiff would be impaired for
5 the next two to three years. AR at 329.

6 The ALJ extensively summarized the medical evidence, and concluded that "the record
7 supports that when the claimant is compliant with mental health treatment his symptoms
8 improved. For example, in December 2009, the claimant reported that he was taking 80 mg of
9 geodeon and he slept better. He denied any side effects. He reported that his mood had been
10 fairly even." AR at 28. At that time, plaintiff "also reported that he planned to stay on
11 medications and he was doing very well. On discharge from mental health treatment in
12 December 2009, the claimant reported that this was the best he had ever done in terms of least
13 amount of marijuana use. He reported that he was happy with his geodone and he wanted to
14 stay medically compliant." AR at 28. With respect to medical records from January through
15 June 2010, the ALJ noted that plaintiff's bipolar disorder was controlled by geodon and that
16 clinicians noted that plaintiff's "low mood was likely related to significant social stressors."
17 AR at 28. In June 2010, plaintiff reported no manic episodes since starting geodone although
18 he reported that geodon did not help with his depression. AR at 28.

19 The ALJ gave "little weight" to Dr. Hopfenbeck's opinion that plaintiff "was moderate
20 to markedly limited in cognitive and social factors including the ability to respond
21 appropriately to and tolerate the pressures and expectations of a normal work setting." AR at
22 29. Specifically, the ALJ noted that Dr. Hopfenbeck's opinion was given when plaintiff had
23 recently restarted a trial of medication after being off medication for five years. AR at 29. The
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1 ALJ also cited plaintiff's "lack of treatment and substance use as noted by Dr. Hopfenbeck
2 during that time" as reasons for rejecting Dr. Hopfenbeck's opinion. AR at 29.

3 Plaintiff contends that "the ALJ erred by failing to provide specific and legitimate
4 reasons, supported by substantial evidence, for rejecting Dr. Hopfenbeck's opinion. First,
5 [plaintiff] had been on medication prescribed by a psychiatrist at Harborview Medical Center
6 for two months prior to Dr. Hopfenbeck's evaluation of him." Dkt. 20 at 6 (citing AR at 339,
7 341-42, 349-50). Plaintiff asserts that "despite compliance with his medication regiment over
8 the next year, [plaintiff]'s depression did not improve. Second, Dr. Hopfenbeck was aware of
9 [plaintiff]'s substance abuse at the time and opined that he did not believe 'alcohol or drug
10 treatment would be likely to improve [his] ability to function in a work setting.'" *Id.* (citing AR
11 at 327). Finally, plaintiff points out that "the ALJ himself did not find that Grzeczowski's
12 substance abuse was a material factor." AR at 24.

13 The Commissioner responds that the ALJ reasonably discounted Dr. Hopfenbeck's
14 opinion because it was inconsistent "first, with evidence that Plaintiff improved with treatment;
15 second, with objective exam findings; and third, with Plaintiff's activities of daily living. Each
16 of these reasons supplies substantial evidence to support the ALJ's [decision]." Dkt. 21 at 4.
17 The Commissioner points out that upon plaintiff's discharge from inpatient treatment in 1996,
18 he was stable on medication and his symptoms were controlled. *Id.* at 5 (citing AR at 287,
19 235). There were no treatment records between October 1996 and September 2009, with the
20 exception of injuries sustained in a fight during Hurricane Katrina in 2005, and "thereafter,
21 plaintiff resumed treatment and gradually improved until he stabilized in December 2009." *Id.*
22 (citing AR at 331-67). Specifically, plaintiff first "resumed treatment on September 10, 2009,
23 when he presented to Harborview Mental Health Services (HMHS) reporting that he had not
24 been on any medication for five years." *Id.* (citing AR at 367). Plaintiff was treated with

1 Risperdal and Geodon, and plaintiff “improved and his treatment was terminated on December
2 2, 2009.” *Id.* at 5-6 (citing AR at 331).

3 The Commissioner asserts that records from 2010 and 2011 reflect that plaintiff began
4 treatment with the Downtown Emergency Service Center (“DESC”), with a focus on obtaining
5 housing. AR at 500. Although plaintiff was still experiencing some symptoms of depression,
6 he reported that he was doing well once his housing became stable. *Id.* at 6 (citing AR at 459,
7 426, 500, 505, 509, 512-13, 516).

8 With respect to Dr. Hopfenbeck’s opinion, the Commissioner argues that the ALJ did
9 not err by concluding that his opinion did not account for plaintiff’s improvement with
10 treatment once he became stable on his medications in December 2009. Dkt. 21 at 7. Indeed,
11 the Commissioner points out that “Dr. Hopfenbeck indicated Plaintiff would improve with
12 treatment, [AR at 329], opining he ‘needs stabilization, to learn the difference between abuse
13 of cannabis and legitimate uses.’” *Id.* (citing AR at 329-30). The ALJ also correctly noted that
14 plaintiff had only recently started treatment at the time of Dr. Hopfenbeck’s November 2009
15 assessment, AR at 29, and “as discussed above, Plaintiff stabilized in December 2009, and his
16 treatment at HMHS ended as a result.” *Id.* (citing AR at 331). Although plaintiff still
17 experienced depressive symptoms during his treatment at DESC, he improved upon achieving
18 housing and “Dr. Hopfenbeck’s opinion was less useful because it did not consider or account
19 for these developments.” *Id.*

20 Plaintiff replies that the Commissioner misconstrues his “improvement” following
21 inpatient treatment in 1996, and in any event, this evidence is “too remote to be relevant to
22 Grzeczowski’s condition in 2010 and 2011, and serve as a basis for rejecting contemporary
23 medical opinions.” Dkt. 22 at 3. With respect to plaintiff’s improvement during his treatment
24 at Harborview Medical Center from September 10, 2009 to December 2, 2009, plaintiff asserts

1 that although “by March 2010 Grzeczowski’s mania was controlled on Geodon, however, his
2 physician indicated that his depression seemed unaffected.” *Id.* at 4 (citing AR at 437).
3 Similarly, “[i]n May 2010, his prescriber indicated that the increased Geodon dose was
4 working well because his thoughts were less confused, but noted that his depression persists.”
5 *Id.* (citing AR at 430). Although the DESC records largely concern plaintiff’s attempt to obtain
6 housing, plaintiff points out that plaintiff’s improvement in his depressive symptoms once he
7 moved into housing “was transitory. In fact, Grzeczowski’s counselor specifically noted that
8 he continued to be depressed after moving and seemed ‘disappointed that housing did not
9 alleviate his depression.’” *Id.* at 5 (citing AR at 501). Thus, plaintiff argues that “the medical
10 records demonstrate that [plaintiff] remained severely depressed despite medication
11 compliance and confirm the medical experts’ opinion that [he] could not work on a sustained
12 basis.” *Id.* at 6.

13 The Court agrees with the Commissioner that the ALJ provided several specific and
14 legitimate reasons for assigning less weight to Dr. Hopfenbeck’s opinion. As noted above,
15 the ALJ accurately pointed out that Dr. Hopfenbeck’s November 2009 opinion was given
16 when plaintiff had recently restarted a trial of medication after being off medication for five
17 years. AR at 29. At the time of the evaluation, Dr. Hopfenbeck was still observing marked
18 symptoms of mania. Specifically, Dr. Hopfenbeck noted that plaintiff had marked symptoms
19 of mania, pressured and very rapid speech, and tended to over explain and get off track. AR at
20 325-30. Dr. Hopfenbeck also expressly noted that plaintiff was not currently stable on his
21 medications, especially in light of his cannabis use. He commented that plaintiff “[n]eeds
22 stabilization, to learn the difference between abuse of cannabis and legitimate uses.” AR at
23 330. By December 2009, however, plaintiff’s manic symptoms had largely resolved and he
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1 reported being “happy with his geodone” and wanting to “stay med. compliant.” AR at 330-
2 31.

3 The ALJ could afford Dr. Hopfenbeck’s assessment of moderate to marked limitations
4 in cognitive and social factors in November 2009 less weight than other medical evidence,
5 because these limitations pertained to Dr. Hopfenbeck’s evaluation of plaintiff’s manic
6 symptoms as well as his depressive symptoms. AR at 29. As it is undisputed that plaintiff’s
7 mania abated once he became stable on his medications, the fact that Dr. Hopfenbeck’s
8 assessment was conducted shortly after plaintiff sought treatment for the first time in many
9 years and had been “working with new psychiatrist and mental health center for less than 2
10 months” was a specific and legitimate reason for the ALJ to afford his assessed limitations less
11 weight. AR at 29.

12 Furthermore, Dr. Hopfenbeck’s failure to clarify to what extent plaintiff’s cannabis use,
13 as opposed to his mental impairments, influenced the assessed limitations was also a specific
14 and legitimate reason for the ALJ to afford his opinions less weight. Although Dr. Hopfenbeck
15 opined that plaintiff’s “cannabis appears separable from mood disorder” and that alcohol or
16 drug treatment would not be likely to improve his ability to function in a work setting, he also
17 diagnosed cannabis dependence and indicated that plaintiff “needs [his] priority to be
18 stabilization on medications.” AR at 327. Accordingly, plaintiff’s “lack of treatment and
19 substance use as noted by Dr. Hopfenbeck during that time” were specific and legitimate
20 reasons for the ALJ to discount Dr. Hopfenbeck’s opinion. AR at 29.

21 3. *Dr. Dees*

22 Examining psychologist Wayne Dees, Psy.D. evaluated plaintiff for the Social Security
23 Administration on April 22, 2010, shortly after plaintiff began treatment with DESC. AR at
24 391-96. He reviewed some of the records from plaintiff’s prior hospitalizations, Dr.

1 Hopfenbeck's evaluation, as well as treatment notes from Harborview Medical Center and Sea
2 Mar Recovery Center. AR at 391. He noted that plaintiff's mood was depressed and that his
3 affect was blunted. Dr. Dees summarized his test findings by noting that plaintiff's "judgment
4 and insight appear to be fair when he is not in a manic or severely depressed state. He was
5 able to complete both simple and complex instructions." AR at 395. Dr. Dees further noted
6 that plaintiff's "ability to concentrate and his ability to perform mathematical operations are
7 both within normal limits. His performance indicates a moderately impaired ability to learn
8 based on his recall of 2/3 previously learned words after a 5-minute delay." AR at 395. Dr.
9 Dees diagnosed plaintiff with bipolar disorder and cannabis dependence, and assessed a GAF
10 score of 40-45. AR at 396. He opined that plaintiff's prognosis was poor with regard to his
11 ability to return to work, but successful intervention with mental health counseling may
12 improve his ability to work in the future. AR at 395.

13 The ALJ gave "significant weight" to the majority of Dr. Dee's opinions. Specifically,
14 he noted that "in April 2010, Dr. Dees opined that the claimant was able to complete both
15 simple and complex instructions. He noted that the claimant's ability to concentrate and
16 perform mathematical operations were both within normal limits." AR at 29-30. In particular,
17 the ALJ pointed out that "Dr. Dees' opinion is based on exam mental status exam (sic) findings
18 and [is] consistent with the medical evidence of record." AR at 30. However, the ALJ rejected
19 "Dr. Dees' opinion that claimant's prognosis for returning to work was poor at that time,"
20 because this opinion was "inconsistent with his exam findings and the record as a whole. The
21 record supports that when the claimant is compliant with treatment, he had only mild to
22 moderate limitations." AR at 30.

23 Plaintiff argues that the ALJ's reasons for rejecting Dr. Dees' opinion that plaintiff's
24 prognosis for returning to work was poor were not specific, legitimate, or supported by

1 substantial evidence in the record. Plaintiff asserts that “first, the ALJ failed to cite any
2 evidence in the record demonstrating that [plaintiff] was non-compliant with his prescribed
3 treatment . . . [plaintiff] took his medication as prescribed from September 2009 through his
4 hearing in April 2011.” Dkt. 20 at 8. Second, plaintiff asserts that Dr. Dees’ exam findings
5 and the medical record do not undermine Dr. Dees’ opinion that plaintiff’s prognosis for
6 employment was poor, because Dr. Dees noted in his assessment that plaintiff’s insight and
7 judgment would not be fair if he was in a manic or severely depressed state. *Id.* Although “the
8 medical records demonstrate that [plaintiff’s] medication improved his mania by the beginning
9 of 2010, his depression did not improve.” *Id.*

10 The Commissioner responds that Dr. Dees did not explain his reasons for concluding
11 that plaintiff had a poor prognosis for returning to work, and as the ALJ noted, “his conclusion
12 is directly contradicted by his objective assessment showing Plaintiff retained the mental
13 abilities necessary to remember and carry out even complex instructions.” Dkt. 21 at 8 (citing
14 AR at 395). The Commissioner argues that Dr. Dees’ failure to explain this “poor prognosis”
15 is problematic in light of this contradiction with the other parts of his opinion, and an ALJ need
16 not accept an unsupported, conclusory opinion. *Id.* (citing *Bayliss v. Barnhart*, 427 F.3d 1211,
17 1216 (9th Cir. 2005)). Finally, the Commissioner contends that the ALJ in this case reasonably
18 afforded significant weight to Dr. Dees’ conclusions about plaintiff’s functional limitations that
19 were supported, but no weight to the unsupported statement that plaintiff’s prognosis to return
20 to work was poor. *Id.* (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008)
21 (upholding the ALJ’s rejection of medical opinion where the conclusion about the claimant’s
22 limitations was inconsistent with the physician’s objective findings).

23 The ALJ did not err by rejecting Dr. Dees’ conclusion that plaintiff’s prognosis for
24 returning to work was poor, because this finding was inconsistent with his mental status exam

1 findings as well as the record as a whole. Dr. Dees' conclusory assertion that plaintiff's
2 prognosis for returning to work was poor was inconsistent with the rest of his findings, which
3 reflected that plaintiff was currently capable of not only simple but also complex tasks. *See*
4 *Tommasetti*, 533 F.3d at 1041 (upholding the ALJ's rejection of medical opinion where the
5 physician's conclusion about the claimant's limitations "did not mesh with her objective data
6 or history."). Moreover, Dr. Dees' observation that plaintiff's "judgment and insight appear to
7 be fair when he is not in a manic or severely depressed state" does not equate, as plaintiff
8 argues, with a finding that plaintiff was unable to work if he continued to experience some
9 symptoms of depression even when he is stable on his medications. AR at 395.

10 Additionally, the Court cannot agree with plaintiff's interpretation of the ALJ's
11 statements as suggesting, without adequate support, that plaintiff was somehow not complying
12 with his treatment recommendations at the time of Dr. Dees' opinion. Rather, the point the
13 ALJ was making was that the record evidence shows that when plaintiff is stable on his
14 medications, "he had only mild to moderate limitations," even though he still experienced
15 symptoms of depression. AR at 30. The ALJ provided specific and legitimate reasons,
16 supported by substantial evidence in the record, for rejecting Dr. Dees' "prognosis" for
17 returning to work, while accepting the rest of his opinion. AR at 30.

18 4. *ARNP Howes*

19 In order to determine whether a claimant is disabled, an ALJ may consider lay-witness
20 sources, such as testimony by nurse practitioners, physicians' assistants, and counselors, as well
21 as "non-medical" sources, such as spouses, parents, siblings, and friends. *See* 20 C.F.R. §
22 404.1513(d). Such testimony regarding a claimant's symptoms or how an impairment affects
23 his/her ability to work is competent evidence, and cannot be disregarded without comment.
24 *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). This is particularly true for such non-

1 acceptable medical sources as nurses and medical assistants. *See* Social Security Ruling (“SSR”) 06-03p (noting that because such persons “have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists,” their opinions “should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.”). If an ALJ chooses to discount testimony of a lay witness, he must provide “reasons that are germane to each witness,” and may not simply categorically discredit the testimony. *Dodrill*, 12 F.3d at 919.

2 Noel Howes, ARNP, completed a Washington DSHS psychological evaluation form on December 3, 2010. AR at 522-26.⁵ ARNP Howes diagnosed plaintiff with major depressive disorder, and assessed a GAF of 49 based upon “ongoing depressed mood and suicidal thoughts.” AR at 523. ARNP Howes opined that plaintiff was markedly limited in his ability to perform routine tasks without supervision and to communicate and perform effectively in a public setting with even limited public contact. AR at 525. ARNP Howes further indicated that treatment would not improve plaintiff’s ability to work because he had a “significant time [lapse] since last employment.” AR at 525. ARNP Howes recorded no problems, however, with plaintiff’s speech, thought process, thought content, cognition/organization, or insight/judgment. AR at 525-26. Finally, ARNP Howes indicated that plaintiff had reported that his mood was depressed, but thought it was partially related to concerns about his family as well as being out of communication with his six-year old daughter. AR at 525.

20 The ALJ summarized ARNP Howes’ findings but afforded ARNP Howes’ opinion “little weight” because “her opinion is inconsistent with the medical evidence of record. Treatment notes show that the claimant’s symptoms were relatively mild when in compliance. In addition,

24 ⁵ The ALJ refers to ARNP Howes as a female evaluator, whereas the parties refer to ARNP Howes as a male.

1 the claimant's activities of daily living are inconsistent with disability." AR at 30. Finally, the
2 ALJ noted that "Ms. Howe is not an acceptable medical source." AR at 30.

3 Plaintiff contends that the ALJ failed to provide germane reasons for rejecting ARNP
4 Howes' opinion. Specifically, plaintiff asserts that although he was compliant with treatment, he
5 continued to suffer from severe depression. Dkt. 20 at 12. In addition, his daily activities were
6 not inconsistent with disability, as his "minimal activities of daily living do not constitute a
7 germane reason for rejecting ARNP Howe's opinion." *Id.* (citations omitted). Plaintiff argues
8 that the daily activities cited by the ALJ, which included watching television, playing video
9 games, listening to music, checking his email occasionally and reading the bible, are not
10 inconsistent with ARNP Howes' opinion regarding his limitations and employability. *Id.*

11 The Commissioner responds that "the record revealed that, with treatment, Plaintiff
12 stabilized in December 2009 and further improved when he obtained housing in September 2010.
13 Mr. Howes does not explain the basis for his conclusions, except by recording a flat affect and a
14 blunted mood and stating Plaintiff has not worked in a long time." Dkt. 21 at 9 (citing AR at
15 525-26). In addition, the Commissioner contends "Mr. Howes' opinion that Plaintiff is unable to
16 communicate effectively in a work setting is not only unsupported by any clinical findings, it is
17 directly contradicted by examinations showing essentially normal cognitive functioning." *Id.* at
18 10-11 (citing AR at 393-94, 525). Finally, the Commissioner argues that the ALJ properly
19 discounted Mr. Howes' opinion to the extent it conflicts with the claimant's daily activities. *Id.*
20 at 11 (citing *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999)).

21 As noted above, the ALJ was only required to provide germane reasons for rejecting
22 ARNP Howes' "other source" opinion. The Court finds that the ALJ has satisfied this standard.
23 As a threshold matter, the Court notes that the ALJ concluded, as part of his credibility
24 assessment, that plaintiff's "activities of daily living are inconsistent with disability." AR at 28.

1 *See Molina*, 674 F.3d at 1112–13 (holding that a claimant’s activities that are inconsistent with a
2 claimed level of impairment are a proper basis upon which to formulate an adverse credibility
3 determination). Specifically, the ALJ found plaintiff less than credible because his reported
4 daily activities, which included caring for his mother and her home for three years until recently,
5 “getting out” daily and using public transportation, spending time with others watching
6 television and playing video games, reading, and listening to music with friends, were
7 inconsistent with his allegations of crippling depressive symptoms. AR at 28-29. *See Turner*,
8 613 F.3d at 1225 (ALJ properly found discrepancy between stated limitations and reported daily
9 activities undermined claimant’s credibility). Similarly, the ALJ cited plaintiff’s self-reported
10 daily activities as evidence that contradicts ARNP Howes’ assessed limitations. AR at 30.
11 Plaintiff only challenges the ALJ’s latter conclusion, and contends that his daily activities were
12 not a germane reason for the ALJ to discount ARNP Howes’ opinion that his ability to
13 communicate with others in the workplace, even with limited public contact, is markedly limited.
14 Dkt. 22 at 10.

15 The Court cannot agree. The ALJ reasonably concluded that plaintiff’s self-reported
16 activities, undertaken on a regular basis, directly contradict ARNP Howes’ opinion that plaintiff
17 has a markedly limited ability to communicate with others and perform effectively in a work
18 setting, even with limited public contact. AR at 525. As described above, plaintiff spends a
19 large amount of his time engaging in leisure activities with other people, which the ALJ could
20 reasonably consider to be inconsistent with ARNP Howes’ finding of marked limitations in
21 plaintiff’s ability to communicate with others in a work setting. Accordingly, the inconsistency
22 between plaintiff’s activities of daily living and ARNP Howes’ assessed limitations was a
23 germane reason for the ALJ to decline to adopt ARNP Howes’ opinion. *See Morgan*, 169 F.3d
24 at 601-02 (upholding the ALJ’s rejection of a physician’s opinion that was inconsistent with the

1 claimant's activities of daily living, which suggested that the claimant's mental impairments did
2 not prevent him from working). *See also Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d
3 685, 694 (9th Cir. 2009) (holding that where an ALJ has provided clear and convincing reasons
4 for rejecting plaintiff's testimony, those reasons are equally germane to similar testimony by a
5 lay witness).

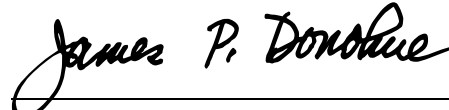
6 Furthermore, as discussed in detail above, the ALJ did not err by concluding that
7 "Treatment notes show that the claimant's symptoms were relatively mild when in compliance."
8 AR at 30. Earlier in his written decision, the ALJ summarized the medical evidence in detail and
9 explained how "the record supports that when the claimant is compliant with mental health
10 treatment his symptoms improved." AR at 28. For example, the ALJ described how plaintiff
11 reported improvement after several months of taking his geodon medication, which controlled
12 his mania, and improved his concentration and ability to sleep. AR at 28. When plaintiff
13 reported "that he was off his medication for three weeks," he experienced a worsening of his
14 symptoms. AR at 30. This was also a germane reason for the ALJ to discount ARNP Howes'
15 assessment of marked limitations in functioning, without any discussion of objective findings or
16 reasons for these limitations. AR at 30. The ALJ did not err in evaluating ARNP Howes'
17 opinion.

18 The role of this Court is limited. As noted above, the Court may neither reweigh the
19 evidence nor substitute its judgment for that of the Commissioner. *See Thomas*, 278 F.3d at 954.
20 When the evidence is susceptible to more than one rational interpretation, it is the
21 Commissioner's conclusion that must be upheld. *Id.* Although it is possible to interpret the
22 medical evidence in the manner suggested by the plaintiff in this case, it is not possible to
23 conclude that this is the only rational interpretation of the evidence. The ALJ did not err in his
24 review and interpretation of the medical evidence.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be AFFIRMED, and this matter be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 19th day of July, 2013.


JAMES P. DONOHUE
United States Magistrate Judge